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No. 218

In the Supreme Court of the United States

OCTOBER TERM, 1964

LEONARD HYATT and MAUDIE HYATT,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No._____

LEONARD HYATT and MAUDIE HYATT,
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v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court were filed November 21, 1961, and a supplemental memorandum opinion, on an issue not germane to this petition, was filed December 14, 1961. The findings of fact and opinion on the issue involved in this proceeding are on pages 145 to 151, inclusive, of the Transcript of Record. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 13-14) is reported

at 325 F.2d 715. The opinion of the Court was based on its prior opinion in the case of *United States* v. *Eidson* which is reported at 310 F 2d 111 (5th Cir. 1962). (Appendix B, *infra*, pp. 17-29).

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1963, and issued as a mandate on February 13, 1964, following its order on January 31, 1964, denying the petition for rehearing. (Appendix A, *infra*, pp. 15-16). The time for filing a petition for a writ of certiorari was extended, by order of Mr. Justice Black, to and including June 29, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., 1958 ed., Section 1254 (1).

QUESTION PRESENTED

Whether the gain realized by the taxpayer Leonard Hyatt on the sale of a general agency or management contract had with a mutual life insurance company for a period of 3½ years is taxable as long-term capital gain under Section 117(a) of the 1939 Internal Revenue Code, rather than as ordinary income, where the taxpayer had risked substantial sums of money in building up the value of the contract.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

Sec. 117. Capital gains and losses —

(a) Definitions. As used in this chapter —

(1) Capital assets. The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include —

(A) Stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

* * * * * * *

Sec. 22. Gross income — (a) General definition.

"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * * * *

(U.S.C. 1952 ed. Title 26, sec. 22(a), sec. 117(a).)

Treasury Regulations 118, Income Tax (1939 Code) Part 39 of Title 26, Code of Federal Regulations:

Sec. 39.117(a)-1 Meaning of terms.

(a) The term "capital assets" includes all classes of property not specifically excluded by section 117(a) (1). In determining whether property is a "capital asset," the period for which held is immaterial.

* * * * * *

Sec. 39.22(a)-1 What included in gross income.

(a) Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. See sections 22(b) and 116. In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets.

* * * * * *

STATEMENT

The basis for federal jurisdiction in the Tax Court of the United States, which is the Court of first instance, is found in Sections 7442 and 6213 of the 1954 Internal Revenue Code. (26 U.S.C., 1958 ed., Sec. 7442; 26 U.S.C., 1958 ed., Sec. 6213).

The undisputed facts found by the Tax Court in its findings of fact are as follows (Transcript of Record, pp. 145-148):

On March 8, 1949, a general agency contract was executed between United Security Assurance Company and Hyatt. United Security was a Texas statewide mutual assessment life insurance company.

Under the terms of this management contract Hyatt was granted the sole and exclusive agency for United Security. The contract called for him to:

> Furnish all necessary office space, office furniture, fixtures, supplies, records and employees to properly operate the business of the Company and to pay all expenses in connection with the operation of the business of the Company except that all properly approved claims under certificates or policies and all attorney's fees and necessary expenses arising out of the defense, settlement or payment of contested claims shall be paid out of the mortuary fund * * *

The contract also provided that:

> Upon the termination of this contract all such office furniture, fixtures, supplies and records shall remain the sole and individual property of the said Hyatt and that he shall be compensated by the Company for all good will of the Company and the value of this contract in such amount as may be determined by the Board of Directors.

He was to be remunerated from whatever amount remained in the expense fund (40 per cent of gross premiums) after the expenses of the business had been paid. The contract also expressly permitted him to sell, assign, or otherwise dispose of it.

At the time of execution of the general agency contract with United Security on March 8, 1949, the company had no assets and no business. Hyatt furnished the necessary finances, the office, furniture, fixtures, employees, and personal services necessary to build up the business.

On November 8, 1952, United Security and Western American Life Insurance Company of Austin, Texas, entered into an agreement under which Western American agreed to reinsure all of